Editor's note: 91 I.D. 271

UNITED STATES

v.

ALBERT F. PARKER ET AL.

IBLA 84-33 Decided September 12, 1984

Appeal from decision of Administrative Law Judge E. Kendall Clarke declaring mining claims null and void and dismissing contest complaint in part. AA-23113, AA-23115, and AA-24659.

Affirmed in part, reversed in part.

1. Evidence: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally

   In a mining claim contest, the Government establishes a prima facie case of invalidity sufficient to shift the burden of proving otherwise to the claimant where the Government mineral examiner testifies that he has examined the claim and can find no evidence of mineralization or where he cannot examine the claim because it is covered with snow and ice.

2. Evidence: Weight -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally

   Assay reports have limited probative value concerning the existence of a valuable mineral deposit on a mining claim when they are not supported by sufficient evidence to show how and where the samples were taken.

3. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally

In a placer mining claim contest, a claimant overcomes the Government's prima facie case of invalidity based on the absence of significant visible gold in pan samples where he submits evidence of samples with gold values above the cutoff identified by the Government mineral examiner for a successful placer mining operation.

4. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally

In a mining claim contest, where a mineral claimant presents more persuasive evidence than the Government with respect to the location of a mining claim on the ground by testimony with respect to the location of certain monuments placed on the ground by the locators of the claim such that the claim encompasses significant mineralization, he overcomes the Government's prima facie case of invalidity based on the absence of mineralization.

5. Mining Claims: Tunnel Sites

A validly located and maintained tunnel-site claim vests a right in the claimant to subsequently locate a mining claim based upon a discovery by the tunnel-site claimant in the course of driving the tunnel. The date of location of the mining claim so located will relate back to the date of location of the tunnel site.

6. Mining Claims: Tunnel Sites

The Department, which is entrusted with the administration of the public lands, is authorized to determine, for its own purposes, the validity of tunnel-site claims in the same way it determines the validity of lode or placer claims. The Department may make a factual determination that the claimant has or has not located the tunnel-site claim in the manner required by the statute. Since this determination is one of fact, it can be considered in a mining contest, if the issue is properly presented.

7. Mining Claims: Tunnel Sites

The provisions of 30 U.S.C. § 27 (1982) provide that a person who locates a tunnel-site claim must mark the claim from the portal of the tunnel. Therefore, the location of a tunnel-site claim without the prerequisite commencement of a tunnel will not be in compliance with the spirit or intent of the statute, resulting in the

> claim being void unless and until there is actual commencement of the tunnel. If the facts disclose that a tunnel-site location was made using a portal of an adit not driven for the purpose of establishing the tunnel-site claim, the tunnel site will be considered to be null and void unless there is a showing that this adit had been extended with the intent of using the adit as a part of a tunnel contemplated under the statutory provision.
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> United States v. Livingston Silver, Inc., 43 IBLA 84 (1979), overruled to the extent it is inconsistent.

APPEARANCES: W. Dean Fitzwater, Esq., Portland, Oregon, for appellants;

Robert C. Babson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Albert F. Parker, Jennie M. Parker, and Jeanne E. Trump have appealed from a decision of Administrative Law Judge E. Kendall Clarke, dated September 12, 1983, declaring 14 lode and placer mining claims null and void and dismissing in part the contest complaint with respect to 4 tunnel-site claims. 1/

1/ This case involves an appeal from Judge Clarke's decision with respect to three contests -- AA-23113, AA-23115, and AA-24659. Contest AA-23113 involves the Challenger Nos. 1 and 2 lode mining claims. Contest AA-23115 involves the Leroy No. 2 lode mining claim and the Tunnel Site Nos. 1 through 4. Contest AA-24659 involves Joe's Dream Nos. 1 through 6 lode mining claims and the Mt. Parker Mining Nos. 1 through 5 placer mining claims. All of the claims are situated between Reid Inlet and the Lamplugh Glacier within the Glacier Bay National Monument (now Park), Alaska, administered by the National Park Service (NPS), U.S. Department of the Interior. The Joe's Dream Nos. 1 through 6 and the Mt. Parker Mining Nos. 1 through 5 placer mining claims and the Tunnel Site Nos. 1 through 4 tunnel-site claims were located Sept. 12, 1976. The Challenger Nos. 1 and 2 mining claims were located Sept. 7, 1976. The Leroy No. 2 lode mining claim was located Aug. 21, 1944. All of the claims were recorded with NPS prior to Sept. 28, 1977, in accordance with section 8 of the Act of September 28, 1976, 16 U.S.C. § 1907 (1982). See Elden A. LeRoy, 49 IBLA 320 (1980).

On April 9, 1979, the Bureau of Land Management (BLM), on behalf of NPS, filed a contest complaint against the Challenger Nos. 1 and 2 lode mining claims, charging that "[t]here are not presently disclosed within the boundaries of the mining claims minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery." On April 19, 1979, BLM filed a similar contest complaint against the Leroy No. 2 lode mining claim. In addition, BLM charged that the Tunnel Site Nos. 1 through 4 tunnel-site claims "do not comply with applicable law (30 U.S. Code Section 27)." On April 16, 1979, BLM filed a contest complaint against the Joe's Dream Nos. 1 through 6 lode mining claims and the Mt. Parker Mining Nos. 1 through 5 placer mining claims, charging that "[v]aluable minerals have not been found within the limits of the claims * * * of sufficient quality and/or in sufficient quantity to constitute a discovery under the mining law." In addition, BLM charged that the land within the Mt. Parker Mining Nos. 1 through 5 placer mining claims is "non-mineral in character."

A hearing into the validity of appellants' mining and tunnel-site claims was held in Juneau, Alaska, before Judge Clarke between October 27 and 29, 1980. After the hearing, Judge Clarke informed the parties that the transcript of the proceedings did not include any testimony after the noon recess on October 29 and notified them that they could request a further proceeding in the event they felt it was necessary. On November 9, 1981, appellants filed a motion to dismiss BLM's contest complaints either with or without prejudice to BLM's right to contest the validity of appellants' claims, because of the unreasonable delays in the adjudication of appellants' claims and the partial loss of the transcript. By order dated December 15, 1981, Judge Clarke denied appellants' motion to dismiss and scheduled an

additional hearing. On September 15, 1982, an additional hearing was held in Juneau, Alaska, before Judge Clarke. By order dated October 25, 1982, Judge Clarke closed the record and set the time for further briefing. Both parties subsequently filed briefs.

In order to become entitled to a mining claim, a claimant must establish the presence of a valuable mineral deposit. 30 U.S.C. § 22 (1982). A valuable mineral deposit exists where the mineral found is of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Castle v. Womble, 19 L.D. 455 (1894). This is the "prudent man test," approved by the U.S. Supreme Court in Chrisman v. Miller, 197 U.S. 313 (1905). It has been refined to require a showing of marketability, i.e., that the mineral can be presently extracted, removed, and marketed at a profit. United States v. Coleman, 390 U.S. 599 (1968).

Appellants' claims are situated within the Glacier Bay National Monument which was closed to mineral entry on September 28, 1976, pursuant to section 3(e) of the Act of September 28, 1976, 90 Stat. 1342 (1982), subject to valid existing rights. See United States v. Peterson, 47 IBLA 92 (1980). In such circumstances, where a mining claim is located on land subsequently withdrawn from appropriation under the mining laws, the claim must be supported by a discovery at the time of withdrawal, as well as the date of the hearing into its validity. Cameron v. United States, 252 U.S. 450 (1920). Accordingly, appellants' mining claims must be supported by a discovery at the time of withdrawal, i.e., September 28, 1976, as well as the dates of the

hearing. We note that the Government, in its contest complaints, did not charge that the Challenger Nos. 1 and 2 and the Leroy No. 2 claims were not supported by a discovery on September 28, 1976. However, that charge was raised at the hearing without objection by appellants. See United States v. McElwaine, 26 IBLA 20, 26-27 (1976).

With respect to allocation of the burden of proof in the case of mining claim contests, it is well established that the Government bears only the burden of going forward with sufficient evidence to establish a prima facie case, whereupon the burden shifts to the claimant to overcome the Government's case by a preponderance of the evidence. Hallenbeck v. Kleppe, 590 F.2d 852 (10th Cir. 1979); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

For the sake of clarity, we will consider each set of appellants' claim groups seriatim.

The Joe's Dream Nos. 1 through 6 Lode Mining Claims

The Joe's Dream Nos. 1 through 6 lode mining claims consist of a "string" of claims one claim in width and 1.6 miles long located near the ridge between Reid Inlet and the Lamplugh Glacier. These claims, which were located by appellants on September 12, 1976, were, in fact, a relocation of a group of claims known as the "Highlander" claims. The Highlander claims, which were owned by parties other than appellants, had apparently been abandoned by their owners. The Government's case, presented by the testimony of Steve Zentner, a Government mineral examiner, is summarized in Judge Clarke's decision at pages 4-5:

Mr. Zentner testified that in July 1977, he along with the claimants, made an aerial reconnaissance of the contested claims. During this flight the location and discovery points on the Joe's Dream claims were pointed out to Mr. Zentner by claimant Jeanne Trump (Tr. 100). Mr. Zentner returned in September, 1977, accompanied by Mr. Glenn Reed, a mining engineer with the National Park Service, and examined the claims on foot. The information provided by Mrs. Trump, along with location notices found on the claims, gave Mr. Zentner an indication of where the claim boundaries and discovery points were (Tr. 94).

Mr. Dale Henkins, a representative of the claimants, accompanied the two Park Service mineral inspectors on their inspection in September 1977, and pointed out relevant features on the claims (Tr. 150).

A total of five to seven pounds of chip samples from mineralization occurring on Joe's Dream's claims Nos. 1 and 2 were taken by Zentner and Reed during their examination of the claims. These samples were taken from excavations present on the claims. These pits had been pointed out during the aerial inspection by Mrs. Trump and by Dale Henkins during the terrestrial examination. Of the several pits pointed out by Mr. Henkins, the pits on the lower end of the claim were not sampled (Tr. 150).

One of the pits occurring on claim No. 1 contained a nine-inch quartz vein from which a three to four pound chip sample was taken [(Tr. 95, 100-01, 104)]. Another two to three pound chip sample was obtained from a one to two inch wide vein evident in an excavation on claim No. 2. This latter vein was apparent for 15-20 feet on the surface [(Tr. 96, 101)]. Additional pits were found on claim No. 3, but no samples were taken due to absence of mineralization [(Tr. 105)]. Claim Nos. 4 through 6 were covered with snow and ice to a degree which made sampling impracticable [(Tr. 96-97)].

Mr. Zentner returned the following year, in September, 1978, to re-examine the claims. No additional samples were taken as snow and ice persisted on claim Nos. 4 through 6.

The assay results of the samples taken during the examination appear in government Exhibit 11. The values for the two chip samples taken were .1 ounces of gold per ton and .04 ounces of silver per ton for the sample from claim No. 1 (Sample marked LR-20) and .23 ounces of gold per ton and .10 ounces of silver per ton for the sample from claim No. 2 (Sample marked LR-24).[2/]

2/ Zentner further testified that these gold values per ton equated to $12 per ton (LR-20) and $30 per ton (LR-24), using a September 1976 gold price of between $115 and $120 (Tr. 110). Zentner stated that these values were not high enough to make mining practical and that: "You would have to hope that somewhere along this vein there was an old ore shoot that would be significantly higher, thirty times this high" (Tr. 111). In effect, Zentner testified that gold values would have to be on the order of 3 ounces per ton.

> In the witness' opinion, it would not be reasonable to expend further time and money developing these claims, as there is not a reasonable probability of developing a successful mine on them [(Tr. 112)]. Mr. Zentner based his opinion on the fact that the gold values reflected in the samples are low, and not indicative of terrain worthy of development. This conclusion is buttressed by Zentner's finding that there is little material, especially on claim No. 2 worthy of extraction at any value. Further, claim No. 3 is devoid of mineralization and partially covered with snow and ice. Because claim Nos. 4, 5 and 6 were covered by a glacier, and therefore could not be sampled, it cannot be contemplated that they could support a successful mine (Tr. 110-112). This last opinion is corroborated by government Exhibit 6, a United States Geologic Survey (USGS) Map of the area which shows "Ptarmigan Glacier" covering much of claim Nos. 3 through 6.[3/]
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> Upon cross-examination, Mr. Zentner identified and read from three USGS reports on the geology of the Reid Inlet area. Two of these reports, Professional Paper #632 and Report #78494 by Hope and Carr spoke favorably of the prospect of gold existing on the claims in quantities which would justify mining development thereon. Mr. Zentner felt, however, that the high values reported were misleading, as there is little high grade material to mine on the claims. He reiterated the fact that neither he nor Mr. Reed observed any of the large veins referred to in the publications and, in any event, it would be difficult to predict, and expensive to ascertain; the nature of the subsurface veins (Tr. 151-153, 159).

At the hearing, appellants made a motion to dismiss the complaint as to the Joe's Dream claims, arguing that the Government had failed to properly examine the claims. See Tr. 203-04. The motion was essentially denied by Judge Clarke. See Tr. 206. In his September 1983 decision, Judge Clarke concluded that the Government had established a prima facie case through the testimony of its mineral examiner. On appeal, appellants dispute this finding, contending that a prima facie case cannot be based on two samples with respect to the Joe's Dream Nos. 1 and 2 claims and no samples with respect to the four remaining claims.

3/ The map, however, was compiled in 1954 and does not take into account any diminution in the size of the glacier which may have taken place between 1954 and 1977.

We conclude that the Government did establish a prima facie case with respect to the Joe's Dream Nos. 1 and 2 claims. The mineral examiner identified the exposed veins within the claims and took samples of the veins he believed most likely to contain gold. The assay results he obtained from these samples indicated the presence of very little gold and his testimony with respect to the nature and extent of the vein material were sufficient to establish a prima facie case of invalidity.

[1] The case is somewhat different with respect to the Joe's Dream Nos. 3 through 6 claims. The record indicates that the mineral examiner examined the Joe's Dream No. 3 claim and could find no evidence of mineralization. Observation of an absence of mineralization is sufficient to establish a prima facie case of invalidity. However, the mineral examiner never examined the Joe's Dream Nos. 4 through 6 claims. See Tr. 144. Zentner stated that this failure was due to the fact that at the time of his examination the claims were completely covered with snow and ice. See Tr. 96.

On appeal, appellants challenge the presence of snow and ice on two of the three claims, referring to testimony by Phil Holdsworth, a mining engineer who is familiar with and has examined appellants' claims. Holdsworth testified that the Joe's Dream No. 4 claim is completely covered with ice, but that the Joe's Dream Nos. 5 and 6 claims are only partially covered with ice (Tr. 261-62, 266). However, Holdsworth testified that the Joe's Dream Nos. 5 and 6 were covered by snow and ice except on rare occasions when there is low snowfall. See Tr. 262. Thus, this testimony does not dispute the fact that at the time the mineral examiner attempted to examine the Joe's Dream Nos. 4 through 6 claims, they were not subject to visible examination because of the presence of snow and ice.

These facts are similar to those in United States v. Rukke, 32 IBLA 155 (1977), aff'd, Rukke v. United States, Civ. No. 77-206T (W.D. Wash. June 23, 1981). In the Rukke case the mineral examiner testified that he was unable to examine 7 of the 40 claims because they were inaccessible due to snow and glacial thawing causing rock slides. The mineral examiner also testified that he had observed these claims from a helicopter and when doing so observed no evidence of mining activity. Id. at 163. The Board found that there was sufficient basis for forming an opinion that no discovery had been made on the inaccessible mining claims. Id. at 164. In the case now before us, we find the same to be true. There is sufficient basis for the opinion stated and a prima facie case has been established. We recognize that this case is weak and can be overcome with minimal evidence of the existence of mineral on the claims. See also United States v. Cook, 71 IBLA 268 (1983); United States v. Long Beach Salt Co., 23 IBLA 41 (1975). We conclude that the Government established a prima facie case that the Joe's Dream Nos. 1 through 6 claims were not supported by a discovery on the date the land was closed to mineral entry, i.e., September 28, 1976.

We turn, therefore, to the question whether appellants have overcome the Government's prima facie case. Appellants' evidence is summarized in Judge Clarke's decision at pages 6-7:

> Mr. William Affleck, a former mineral sampler for the U.S. Bureau of Mines testified on behalf of claimants. In 1977 while engaged in geologic sampling in conjunction with a wilderness study of the Reid Inlet area, Mr. Affleck picked up a rock which he testified came from the vicinity of Joe's Dream No. 2 or 3. This sample was not marked or otherwise identified by Mr. Affleck when it was taken, nor later assayed by the Bureau of Mines, and remained in Mr. Affleck's possession until he learned of the claimant's pending litigation over the claims. Mr. Affleck then gave the sample to claimant Jeanne Trump (Tr. 267). This sample is labeled contestee's Exhibit M.

Mr. Affleck returned, during the summer of 1979, to point out to the claimants where he took the sample. Accompanying claimants was Mr. Phil Holdsworth, a registered mining engineer and former Commissioner of Mines for the Territory of Alaska. Mr. Holdsworth testified that he, along with Affleck and the others, tried to find the source of the sample, as it was loose on the ground, or "float", when taken. Although not precisely located, Mr. Holdsworth felt the source of the sample was on claim No. 3 and marked this location on contestees' Exhibit L [(Tr. 260)].[4/] He also testified that upon this inspection, the southern one-quarter of claim No. 3 was free of snow and that the eastern portions of claim Nos. 5 and 6 were free of snow and ice (Tr. 259-261).

Mrs. Trump had this sample fire assayed and the results of which appear in contestees' Exhibit CCC. This assay report shows values of .488 ounces of gold per ton and 4.8 ounces of silver per ton.

Additional assay reports were submitted by the contestees in an attempt to overcome the government's case. These reports are labeled contestees' Exhibits DDD, EEE and HHH, and were obtained by claimants from Dr. Vernon Scheid, a business partner of Walter Duff, who staked along with his son Lawrence, the Highlander claims. The Highlander claims were located on land now known as the Joe's Dream claims and this fact is supported by contestees' Exhibits FFF, GGG and III, Location Notices for the Highlander group.

These assay reports show high values of gold on the claims. Specifically, Exhibit DDD gives values from 35.292 ounces of gold per ton to .018 ounces of gold per ton. Exhibit EEE shows values of 4.66 ounces of gold per ton, and Exhibit HHH shows a chemical analysis report of 5.04 ounces of gold per ton. Mrs. Trump testified as to the origins of these assay reports, as well as how she determined, using field notes taken by Duff, that the samples were taken from the area encompassed by the Joe's Dream claim. Mrs. Trump testified that the discovery post on the Highlander corresponded with the corner post of Joe's Dream No. 2 and that the samples labeled 74 H-1 through 74 H-6 were from the Highlander, hence Joe's Dream, because the "H" stood for Highlander in Exhibit DDD. Mrs. Trump could not be certain from which of the six Joe's Dream claims each of these samples were taken [(Tr. 390-97)]. 5/

4/ The placement of the believed source of the sample on appellants' exhibit L indicates that the "float" sample actually came from the Joe's Dream No. 2 claim. See Exh. 6. This was confirmed by Jeanne E. Trump, one of the appellants and locator of the Joe's Dream claims. See Tr. 383.

5/ The transcript, however, indicates that Trump was able to determine that the location from which sample 74 H-2 was taken was within the Joe's Dream No. 2 claim, using the description in the notes attached to the assay report

The record also contains a report prepared by David A. Brew and others of the Geological Survey and Bureau of Mines (GS and USBM), dated 1978 (Brew Report) (Exh. 14), evaluating the mineral resources within the Glacier Bay National Monument. The report, at page C-197, states that the Reid Inlet area contains gold "in relatively small, discontinuous quartz veins and associated shear zones in metasedimentary and altered dioritic and granodioritic rocks." Gold was produced from mines in the area between 1938 and 1950, principally from the Leroy mine, which averaged $100 per ton at $35 per ounce (about 2.85 ounces per ton). "Virtually all veins sampled (1954, 1966, and during the present study) were found to be goldbearing," but "[m]ost veins were small in dimension, both in thickness and exposure length, although an occasional vein was up to four feet thick and some appeared to persist along strike for as much as several hundred feet." Id. With respect to the "Highland Chief (Joe's Dream) prospect," the report indicated the results of sampling conducted in the claim area. The report also noted that Rossman (1959) had reported that the original locator of the Highland Chief claims had found a vein up to 6 feet thick and containing a considerable amount of free gold but that it was not found during later surveys. The report also noted that Reed (1938) had reported finding four or five parallel quartz veinlets typically yielding 0.26 ounce per ton of gold. Exhibit 14, at page C-228, stated that, based on 40 samples taken by the GS-USBM team in 1977, gold values ranging from nil to 3.49 ounces per ton were obtained. The width of the sample containing 3.49 ounces per ton was 0.2 foot. The report contains a map of the GS-USBM sample locations within the Highland Chief (Joe's Dream) prospect (figure C-52), which, from its location on another map of the

fn. 5 (continued)
in exhibit DDD (Tr. 393). This particular sample assayed at 33.834 ounces per ton of gold and 20.27 ounces per ton of silver.

Reid Inlet area (figure C-45), appears to be situated within the Joe's Dream No. 2 claim.

[2] Appellants submitted assay reports purportedly reflecting values of samples taken from the Joe's Dream claims. These assay reports were made prior to appellants' location of the claims and the samples assayed were not taken by appellants (Exhs. CCC, DDD, HHH). In his September 1983 decision, Judge Clarke concluded that appellants did not overcome the Government's prima facie case because the assay reports submitted by appellants "can be given little probative value * * * because the persons who took the samples were not present to testify regarding the methods used in extracting and treating the samples" (Decision at 25). Judge Clarke cited the cases of United States v. Smith, 54 IBLA 12 (1981), and United States v. Downs, 61 IBLA 251 (1982), for the latter proposition. The proposition cited by Judge Clarke, however, does not appear in either Smith or Downs. Indeed, we have not required the person who has taken samples from certain mining claims to testify at a hearing into the validity of those claims. See United States v. Arbo, 70 IBLA 244, 250 (1983). Rather, Smith and Downs and other similar cases stand for the proposition that assay reports will have limited probative value where there is no evidence as to how and where the samples were taken. See United States v. Jones, 72 IBLA 52, 57 (1983). The crucial flaw in appellants' reliance on these assay reports is the fact that there is no clear evidence of either the location from which the samples were taken or the nature of the structure sampled. Without this evidence there is no way to determine if the samples were, in fact, taken from a point within the boundaries of the claims, the claim from which the samples were taken or what the assays are to represent in the way of ore in place. See United States v.

Dresselhaus, 81 IBLA 252 (1984); Cactus Mines Limited, 79 IBLA 20 (1984). Appellant Trump testified that the assay report introduced as exhibit CCC (dated October 8, 1980) was an assay of a piece of float and that she could not identify the source of the sample for the assay report marked as exhibit HHH (dated December 26, 1974). Exhibit DDD (dated May 16, 1975) was a series of assay reports and a narrative description of the sampling conducted on the Highlander claims written in 1974. While the report describes the samples, it does not give any information regarding the size of the samples or the material represented. It appears from the report that these samples are merely grab samples taken of material found during a reconnaissance of the claims and do not represent any attempt to delineate a mineralized zone or ore body. For example, one of the samples (74-Hl) was of a "2 [inch] piece of oily-vitreous vuggy quartz."

As previously noted, the Joe's Dream claims were located by appellants shortly prior to the withdrawal of the lands from mineral entry. Appellants presented no evidence of any activity by them at the time of locating the claims. The mineral examiner found no evidence of recent activity on the claims. Having made the location such a short time prior to the withdrawal and subsequent hearing, it would seem reasonable to expect that the claimants would have knowledge and a clear recollection of the location of the mineral in place. The testimony related an attempt to find the source of a piece of "float" rather than the location of mineral in place supporting discovery. A location of a lode claim is not supported by the finding of "float" ore. Waterloo Mining Co. v. Doe, 56 F. 685 (S.D. Calif. 1893). Having allegedly made the discovery only a short time prior to the hearing, the inability to identify the discovery points raises the presumption that appellants had not yet established a discovery.

We further find that, considering the nature of the mineralization found by the GS-USBM team and the mineral examiner, the mineralization exposed on Joe's Dream claims was not of sufficient quantity and quality to warrant development of a mine. While the values may well justify further exploration, the values were too erratic and the veins too discontinuous to commence these operations without further exploration. A valuable mineral deposit has not been discovered because a search for such deposit might be indicated. Henault Mining Co. v. Tysk, 419 F.2d 766 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969). Therefore, we must conclude that appellants did not overcome the prima facie case.

Mt. Parker Mining Nos. 1 through 5 Placer Mining Claims

The Mt. Parker Mining Nos. 1 through 5 placer claims are located north and east of Mt. Parker, along the Ptarmigan Creek. The Government's case presented by the testimony of Steve Zentner, is summarized in Judge Clarke's decision at pages 8-9:

> Mr. Steve Zentner, a mining engineer with the National Park Service testified on behalf of the government that he took samples from the claims on two occasions. Mr. Zentner, who has considerable experience in sampling as assessment work involving placer claims (Tr. 121), sampled claim Nos. 1 and 2 in July, 1977. Mr. Dale Henkins, a representative of contestee Jeanne Trump, accompanied Mr. Zentner on this examination after Mr. Zentner had made a reconnaissance of the claims on his own (Tr. 113).
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> The results of this sampling, as well as the results of a second sampling performed by Mr. Zentner on August 14, 1978, are included in government's Exhibit 12 titled "Mineral Report for the Mt. Parker Group of Placer Mining Claims in Glacier Bay National Monument, Alaska."

In Mr. Zentner's opinion, the sampling performed in 1977 yielded only miniscule amounts of gold and nothing of economic value. These samples consisted of four surface pan samples taken and panned on placer claim Nos. 1 and 2 by Zentner and Henkins. 6/ These samples were not kept nor assayed (Tr. 113). In August, 1978, Mr. Zentner returned to the claims and took a second set of samples from the area. These consisted of several pan samples from along Ptarmigan Creek and on claim Nos. 2, 3, 4 and 5. Mr. Zentner stated that no significant gold coloration was found in the 20 or so pans he took. No samples were taken on claim No. 1 on this occasion as no gravel suitable for sampling was encountered [(Tr. 115)].

The second set of samples were taken from an area below the old mining cabin on the property (which can be seen in photo No. 13 of contestees' Exhibit Y), to a spot approximately one-quarter of a mile above the LeRoy lode mining claim (Tr. 114, 118). Mr. Zentner is not certain which claim he was on when he took individual samples, as not all boundary markers were observed during the sampling. The witness is certain that he was sampling on placer claim Nos. 2, 3, 4 and 5, however, as the claims are staked, according to location notices and contestees' descriptions, along Ptarmigan Creek on the area from whence the samples came. Also, the witness felt that it was not crucial to ascertain exact sample locations as the terrain sampled was uniform in terms of structure, geomorphosis, and gold content, consisting entirely of glacial till (Tr. 118-120, 163).

The samples were all from the surface and according to Mr. Zentner, contained very little black sand, pyrite or gold, being composed mostly of fine sand. A chemical assay was not performed on the samples, as Mr. Zentner felt that the level of visible gold was too low to warrant undertaking such tests (Tr. 170).

Upon cross-examination, Mr. Zentner agreed with counsel for contestee that a statement in the "Mineral Report", government Exhibit 12, that, "no gold was recovered" in the samples was misleading. A more accurate statement would be, "no gold of economic importance was found" (Tr. 166).

In Mr. Zentner's opinion, a reasonable man would not be justified in spending additional effort and money with a reasonable prospect of developing a paying mine on any of the placer claims (Tr. 122). This opinion is based upon three considerations. It is based primarily on the fact that the gold values observed in the samples are low, secondly, that glacial till is

6/ Zentner actually testified that these pan samples were taken on the Mt. Parker Mining No. 3 claim (Tr. 114). However, in his mineral report at page 3 (Exh. 12), Zentner stated that the claims sampled were the Mt. Parker Mining Nos. 1 and 2 claims.

> very difficult material to process, despite the accessibility of the claims and an abundance of water in Ptarmigan Creek for sluicing the gravel, and thirdly that there is no evidence of previous mining activity on the claims (Tr. 123, 172).[7/]

In his September 1983 decision, Judge Clarke concluded that the Government established a prima facie case of invalidity. On appeal, appellants argue that the Government's case is undercut largely by the fact that Zentner stated that he did not know from which claim each of his second set of samples were taken. See Tr. 163. However, Zentner's determination was not made on the basis of the samples alone. He had physically been on each of the claims, even though there is a question as to whether he took samples from each. The samples taken and his observations verified the uniformity of the gravel deposited and having found no gold considered by him to be of commercial quantity, he concluded that there had been no discovery on any of the placer claims. Likewise, Judge Clarke concluded that the samples were relevant to each of these claims because of the similarity of the glacial placer deposit. Indeed, the Brew report (Exh. 14) at C-196, which characterized the surface deposits in the basin of Ptarmigan Creek generally as glacial moraines, alluvium, and colluvium reinforced this determination. The Government samples were intended to be determinative of the quantity of gold which could reasonably be expected on the claims. We conclude that the Government did establish a prima facie case based on the results of pan samples generally within the area of the claims and the observation with respect to the

7/ Zentner testified that mining could take place within the placer claims if the gold values were $2 per cubic yard (Tr. 171). Dale Henkins, appellants' representative, agreed with this conclusion (Tr. 437-38). However, Zentner did not specify whether this figure was at 1976 or 1980 gold prices. However, using one ton per cubic yard and a price of gold of $120 per ounce, in August or September 1976, Zentner's cutoff for successful mining is 0.017 ounce per ton of gold. At the higher gold prices recorded in 1980, the cutoff only decreases.

nature of the gravel on the claims. See United States v. Long Beach Salt Co., supra. With respect to the Mt. Parker Mining No. 1 claim, it was conclusively determined that this claim had been sampled and the Government's prima facie case was clearly established by the results of specific pan samples.

Judge Clarke also based his finding of a prima facie case on the lack of production. We have held that a presumption that a mining claim is not supported by a discovery arises where there has been little or no development or operations on the claims over a long term. United States v. Kaycee Bentonite Corp., 64 IBLA 183, 220, 89 I.D. 262, 282 (1982); see also United States v. Zweifel, 508 F.2d 1150 (10th Cir. 1975). However, we will not apply this presumption where appellants located the claims on September 12, 1976, and claimants had been precluded from conducting mining operations since September 28, 1976.

We, therefore, turn to the question of whether appellants have overcome the Government's prima facie case of invalidity. Appellants' evidence consists largely of general statements regarding the existence of gold on the claims and assay reports. Holdsworth testified that in 1954 he took a sample (PRH 54-36) from a spot which was near what is now the boundary between the Mt. Parker Mining Nos. 4 and 5 claims. He stated that in taking this sample the gravel was screened, panned and concentrated. The concentrate was assayed (Tr. 236). This sample assayed at 0.02 ounce per ton of gold and nil of silver. See Tr. 238-39; Exhs. 6 and H. Exhibit 6 indicates that the sample came from what is now the Mt. Parker Mining No. 4 claim. Jennie M. Parker, one of the appellants and co-locator of the Mt. Parker placer claims, testified that a sample reported in an assay report, dated August 17, 1953 (Exh. T,

sample #10), was taken from the Mt. Parker Mining No. 3 claim (Tr. 291). The assay, which appears to be a fire assay, indicates values of 0.04 ounce per ton of gold and a trace of silver. Parker also testified that an employee of a potential lessee of the Leroy claims had reported a surface sample of $26 per ton (Tr. 294). Jeanne E. Trump also testified that she had been told that a sample taken from the Mt. Parker Mining No. 4 claim in August or September 1974 assayed at 0.223 ounce per ton of gold ($29 per ton with gold at $130 per ounce) (Tr. 302-04). Trump also testified that another sample, taken by a previous claimant from what she believed to now be the Mt. Parker Mining No. 1 claim, assayed at 0.08 ounce per ton of gold and 0.1 ounce per ton of silver (Tr. 399; Exh. EEE). Finally, Henkins testified that a two pound grab sample of gravel taken from either the Mt. Parker Mining Nos. 1 or 2 claims was fire assayed and that the average value of gold was 0.019 ounce per ton (Tr. 428-29; Exh. RRR). Henkins then testified that he made a cost analysis of mining the placer material, calculating the return at $2.28 per ton using gold values of from 0.019 to 0.02 ounce per ton and the August or September 1976 price of gold at $120 per ounce (Tr. 435). Figuring a 10-hour day and the processing of 300 cubic yards of material per day, Henkins testified that the return would be $1,067.04 per day (Tr. 436). Henkins concluded that he could make a "reasonable profit" based on a small operation. Id.

[3] Judge Clarke concluded that appellants did not overcome the Government's prima facie case. When considering the testimony and the weight that can be given to each of the assays submitted, we must conclude that the samples either support the Government's case or are of such nature that they can be given little weight. A close examination of the assay report for the Holdsworth sample discloses that the assay was of the sample sent to the

assay lab. This sample had been concentrated by Holdsworth prior to delivery and the assay shown cannot be equated to the gold content of the placer material prior to concentration. The assay shown on exhibit T was apparently a fire assay and there is no indication whether this assay was of the gravel or black sands after concentration. There is no support for the $26 per ton sample or the 0.223 ounce per ton sample reportedly taken. The 0.08 ounce per ton sample described by Trump was not substantiated. The Henkins' assay was a fire assay of the gravels and can be given little weight, as a fire assay is not representative of the values that could be recovered from a placer operation. See 2 Tr. 42-43, 54-55; Placer Examination Principles and Practice, BLM Technical Bulletin 4, at 91. 8/ Appellants introduced no other evidence specifically identifying the presence of gold on any of the other placer claims. See United States v. Rosenberger, 71 IBLA 195, appeal filed, Rosenberger v. United States, Civ. No. 83-842 PHX-CLH (D. Ariz. May 6, 1983). Therefore, we conclude that appellants did not overcome the Government's prima facie case with respect to the Mt. Parker Mining Nos. 1, 2, 3, 4, and 5 claims.

Challenger Nos. 1 and 2 Lode Mining Claims

The Challenger Nos. 1 and 2 lode mining claims are situated on the southwestern flank of Mt. Parker, adjacent to the Lamplugh Glacier. The Government's case was presented by the testimony of Fred Spicker, a geologist, which is summarized in Judge Clarke's decision at pages 13-15:

8/ The transcript of testimony taken Sept. 15, 1982, is referred to as 2 Tr. This testimony was taken in order to compensate for the lost portion of the original transcript. Each transcript is separately paginated.

Mr. Spicker, along with fellow Park Service employee, Don Chase, examined the Challenger claims on August 16, 1979. Mr. Spicker had consulted literature on the geology of the area prior to his visit to the claims and had been pointed out from the air the general vicinity of the claims by Mr. Glen Reed, a mining engineer with the Park Service. Mr. Reed had been shown the claims by claimant Jeanne Trump on a prior aerial examination of the claims (Tr. 10-12). Mr. Spicker had also been shown the claims from the air by Mr. Steve Zentner of the Park Service on August 15, 1979 and he carried an aerial photo of the claims with him during the examination (Tr. 11, 25).

Mr. Spicker, with the aid of Mr. Chase, took five samples from the vein structure occurring on the claims [(Tr. 25)].[9/] The results of an assay of these samples, as well as Mr. Spicker's conclusions regarding the validity of the claims, are found in government's Exhibit 3, titled "Mining Report on the Challenger No. 1 and No. 2 Unpatented Lode Mining Claims in Glacier Bay National Monument, Alaska."

Mr. Spicker testified about the method of extraction and origins of the five samples [(Tr. 28-33)]. He stated that, as no discovery points had been pointed out to him, and none observed during the examination, he sampled in areas where he felt the strongest mineralization occurred (Tr. 26). The samples taken, labeled C-3 through C-7, were three to six pound chip samples taken in or near vein material on the claims. Although no boundary markers were seen delineating the Challenger No. 1 from the No. 2, Mr. Spicker is fairly certain that samples C-3 through C-6 were taken from claim No. 1 and sample C-7 came from claim No. 2 (Tr. 26).[10/] The locations and characteristics of the rock

9/ Spicker described the vein system as follows:

"It is an interlacing quartz vein system, strikes from about North 65 East to due East. And there is very steep dipping, virtually vertical as a system. The thing is kind of hard to describe. It would be as if you looked at a plane of the vein, it appears as if you were looking at a piece of lace. The thing pinches and swells very rapidly and has numerous branches, which at times split apart with non-quartz vein material between them and in other places coalesced to form a single thicker vein. For the most part the individual branches on the westerly portion of the vein system tend to be about one foot thick to two feet thick, and in places coalesced to the thickest portion I observed was 5.3 feet thick. Then toward the easterly or uphill direction on the claims it starts to peter out pretty fast. For the most part in the uphill section it is a vein system that has little splits, and still pinches. For the most part it is in the area of only about one foot thick, pinches down to about two or three inches very frequently."

(Tr. 19-20). The vein system is "intermittently exposed for about 450 feet of strike length in about 260 vertical feet" (Exh. 3 at 4).

10/ Spicker admitted that he could not determine the exact boundaries of the Challenger Nos. 1 and 2 claims, but located the claims generally on the

from which the samples came can be seen in figures 4-10 in the mineral report.

* * * * * * *

The gold values shown in the assay report vary from 0.010 ounces of gold per ton for sample C-4 to 4.420 ounces of gold per ton for sample C-6. Sample C-5 shows 0.060 ounces of gold per ton, C-3 shows 0.160 ounces of gold per ton and C-7 gave a value of 0.220 ounces of gold per ton.[11/]

Mr. Spicker found no workings on the claims, nor discovery points. The only evidence he saw of prior workings on the claims was a rock which had faded orange paint on it. Mr. Spicker thought this may have indicated where a sample was taken by a previous claimant (Tr. 20).

In his opinion, Mr. Spicker felt that the Challenger claims do not contain within their boundary minerals of such quantity and quality to justify a prudent person's further expenditure with a reasonable prospect of developing a profitable mine (Tr. 38). This opinion is based partly upon the fact that, although there are isolated pods and veins high in gold content on the claims as shown by sample C-6, these sources are highly unpredictable in nature, and not indicative of the claim as a whole. This fact, coupled with the rugged topography and inaccessibility of the area, led to Mr. Spicker's conclusion that the minerals present do not warrant the further development of the Challenger claims (Tr. 36, 58, 72).

According to Mr. Spicker the erratic nature of these zones of rock high in gold content is supported by previous studies of the geology and mining potential of the area (Tr. 10-11, 64).[12/]

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fn. 10 (continued)
ground using the vein system as the center line of the lode claims and judging the relative distances involved in order to set the end lines of the claims (Tr. 26, 55, 84). The claims were plotted on a map of the Reid Inlet area (Tr. 93; Exh. 6). That location generally corresponds with the location of the claims on appellants' map (Exh. E).

11/ Sample C-3 was a continuous chip sample taken from the widest portion of the vein system, i.e., 5.3 feet thick (Tr. 28). The vein at this point is from 4 to 5.3 feet thick and "persists for only 15 feet along dip and for an unknown strike length" (Exh. 3 at 2). Sample C-6, showing the highest gold value, was a continuous chip sample taken from a "small lens or pod that occurs along the vein that is exposed for three to four feet along the outcrop," which vein then splits into two separate veins, one of which is 1 foot thick and the other 4 inches thick (Tr. 31).

12/ In particular, Spicker referred to the report entitled "Mineral Resources of Glacier Bay National Monument, Alaska," dated 1971, by E. M. Mackevett, Jr., and others, which took six samples with respect to the Rambler prospect (now the Challenger Nos. 1 and 2 claims) with a high gold value of 0.263 ounce per ton and averaging 0.11 ounce per ton of gold (Exh. 3 at 5).

Spicker further testified that the lowest gold value at which a mine could be successful was 0.01 ounce per ton, but that this value related to certain large open pit gold mines in Nevada where the mode of occurrence of the gold was "entirely different" (Tr. 79). With respect to the two locations of high grade gold-bearing veing material identified by Spicker and the 1978 Brew report, Spicker concluded that there was at most two tons of visible material and stated that it was "not worthwhile going in with all that man power and equipment to extract only a very, very small tonnage" (Tr. 72).

In his September 1983 decision, Judge Clarke concluded that the Government had established a prima facie case of invalidity. We agree. Appellants' principal objection on appeal is that a prima facie case cannot be established where the Government mineral examiner has made no estimation of the cost of extracting and removing the gold from the claims. We note that Spicker admitted that he made no estimate of that cost (Tr. 68, 85). Nevertheless, we conclude that a prima facie case is established where a Government mineral examiner testifies, based on his observations and expertise, that gold is not present on a mining claim in such quality and quantity to warrant the expenditure of time and means in the development of a mine. That is that situation herein.

We turn, therefore, to the question of whether appellants have overcome the Government's prima facie case of invalidity. The evidence presented by

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fn. 12 (continued)
The report stated that "[a]ll our samples from the veins yielded low gold values." Id. In addition, Spicker referred to the 1978 Brew report which took seven samples with gold values between nil and 0.16 ounce per ton. Id. However, the Brew report also states that two other samples from a 1-foot wide vein with a vertical exposure of 30 feet, assayed at 1.785 ounces per ton and 6.45 ounces per ton of gold. Id. at 6.

appellants is summarized in Judge Clarke's decision at pages 15-16 and consists largely of the reports of assay results:

> Mrs. Trump identified Exhibit JJJ as an assay certificate and report which she received from Dr. Vernon Scheid. Dr. Scheid was a business partner of Walter Duff, who was previous holder of the land now staked as the Challenger (Tr. 400).[13/] The certificate shows results from an assay performed on six samples, labeled AL-12 through AL-17. Attached to the certificate are pages which describe the origins of the samples assayed.
>
> Mrs. Trump feels certain the samples reported in Exhibit JJJ came from the area now staked as the Challenger, and are thus germane to these proceedings. She bases this statement on the fact that she staked the Challenger claim using a location notice written by Duff for the Rambler claim, coupled with her intent at the time to restake the Rambler as the Challenger (Tr. 401). A copy of said [Rambler] location notice was introduced as contestees' Exhibit LLL. The values reported in this assay certificate for the six samples are .04, .20, 3.80, .04, .20 and .09 ounces of gold per ton.
>
> Mrs. Trump next testified about Exhibit KKK, also an assay report. This report was prepared for Walter Duff, and contains the results of assays performed on three samples taken from the Rambler claims. This too, was obtained from Dr. Scheid (Tr. 403). The values contained in this report are 0.20, 0.01 and 2.42 ounces of gold per ton.
>
> Exhibits MMM and NNN were shown to Mrs. Trump. She described Exhibit MMM as another assay report done for Walter Duff for a sample obtained from the Rambler claims (Tr. 403). The values given in the report are 0.78 ounces of gold per ton and .7 ounces of silver per ton. The results were obtained through chemical analysis. Exhibit NNN was described by Mrs. Trump as being a letter to her from Lawrence Duff, who had staked the Rambler in 1963. The letter, after describing the Rambler/Challenger vein, states that the Duffs consolidated 160 pounds of samples from the vein and had them assayed. The assay results figured out to 1.657 ounces of gold per ton, and this figure was written in on Exhibit NNN by Mrs. Trump (Tr. 404).[14/]
>
> Exhibit OOO was next shown to Mrs. Trump. She identified it as the Newmont Report of [1937], a report written by

13/ The reference to "Challenger" appears to include both the Challenger Nos. 1 and 2 claims. See Tr. 401.

14/ The letter also described a sample from a small vein which purportedly assayed at 5.11 ounces per ton of gold (Exh. NNN).

> Mr. Benedict of the Newmont Mining Company, a company which had leased the Rambler properties from Duff for a time. The report contains a paragraph describing, among other claims, the upper and lower Rambler claims, which are now the Challenger Nos. 2 and 1, respectively (Tr. 405). The report states that on the upper Rambler, five samples were taken, with assay results of 1.10 ounces of gold per ton and 0.6 ounces of silver per ton obtained, and on the lower Rambler, six samples were taken, with assay results of 0.79 ounces of gold per ton and 0.6 ounces of silver per ton obtained.[15/]

Appellants also submitted exhibit DDD, dated May 16, 1975, which reported the assay results of five samples (74R-1 through 74R-5) taken from the Challenger claims (Tr. 390). These results were 0.079, 0.009, 0.140, 3.85 and 0.026 ounces per ton of gold. Exhibit DDD also generally described where the samples were taken.

In his September 1983 decision, Judge Clarke concluded that appellants had not overcome the Government's prima facie case. We agree. With the exception of exhibit OOO, none of the assay results have been identified as coming from either the Challenger No. 1 or the Challenger No. 2 claim. Moreover, with the exception of exhibit JJJ, none of the reports of assay results includes a description of the manner in which the samples were taken. In any case, appellants' evidence essentially reinforces the Government mineral examiner's conclusion that the area of the claims is characterized by generally low gold values, with certain "erratic highs." Isolated showings of high gold values are not sufficient to establish a discovery where there is no evidence that such showings are part of a continuous mineralization along

15/ The report stated that the five samples from the Upper Rambler claim were taken from a "short ore shoot about 80 feet in length, average width 2.7 feet, averaging 1.10 oz. gold and 0.6 oz. silver" (Exh. OOO). The six samples from the Lower Rambler claim were taken from an ore shoot having a "maximum possible length" of "about 90 feet," an average width of 4.1 feet, and averaging 0.79 ounce gold and 0.6 ounce silver. Id.

the course of a vein or lode such that the quantity of ore can reasonably be determined by standard geologic means. United States v. Wells, 69 IBLA 363 (1983); United States v. Melluzzo, 38 IBLA 214, 85 I.D. 441 (1978), aff'd, Melluzzo v. Watt, Civ. No. 81-607 (D. Ariz. Mar. 31), aff'd, Civ. No. 83-2056 (9th Cir. Oct. 3, 1983). Finally, even though further exploration may be warranted, appellants have presented no evidence that gold is present in sufficient quantity to justify a prudent man spending his time and means in the development of a mine, especially in light of the anticipated high cost of extraction. It would have been sufficient for appellants to have made some showing as to the minimum acceptable quality and quantity of gold-bearing vein material, considering the obvious cost of development and extraction, in order to have overcome the Government's admittedly weak prima facie case. However, appellants made no such showing.

Leroy No. 2 Lode Mining Claim

[4] The Leroy No. 2 lode mining claim is situated on the northwestern flank of Mt. Parker, about three-quarters of a mile south of Glacier Bay. The claim is southwest and uphill from the Leroy No. 1 lode mining claim and shares a common endline. The Leroy No. 1 claim was not contested because it was the opinion of the mineral examiner that "the tonnage and grade of the material available to extraction therefrom satisfy the 'prudent man rule' for a valid discovery." See Exh. 5 at 1. The Leroy lode mining claim was originally located in 1938. 16/ The Leroy claim was amended as the Leroy No. 1, and the Leroy No. 2 claim was located in 1944. As stated by Judge Clarke,

16/ The location notice for the Leroy claim was described as extending 1,500 linear feet, which clearly did not encompass both the Leroy Nos. 1 and 2 claims. See Exh. D at 2.

in his September 1983 decision at page 18: "The main issue involved in determining the validity of the discovery on the Leroy No. 2 claim is the proper placement of the boundary between the Leroy No. 1 and Leroy No. 2 claims. Contestees' placement differs from the government's placement by about 1,000 feet." The testimony of Steve Zentner with respect to the Government's location of the Leroy No. 2 claim is summarized by Judge Clarke in his decision at pages 18-19:

> Because no discovery points on the Leroy No. 2 were identified by the claimants, Mr. Zentner utilized location notices filed for the original Leroy, the Leroy No. 2 and the Leroy No. 1 amended [Exh. D at 1, 2, 4] to plan his inspection (Tr. 126). It is Mr. Zentner's contention that upon a reading of all of these location notices, the following discovery/boundary locations become apparent, the northern endline of the Leroy No. 1 is 500 feet to the north of the discovery point, which is assumed to be near the existing adits on the claim (Tr. 196),[17/] the southern endline, which would also be the northern boundary of Leroy No. 2 is 1,000 feet to the south of the adits. From this point it is 1,450 feet south to the discovery point on the Leroy No. 2 and from this point, a final 50 feet to the southern boundary of the Leroy No. 2. After plotting the foregoing data on a map [(Exh. 6)], Mr. Zentner concluded that the discovery point on the Leroy No. 2 had to be near the summit of Mt. Parker (Tr. 127-128).

Zentner also testified that he did not attempt to find any monuments or corner posts which might delineate the endline between the Leroy Nos. 1 and 2 claims or ask the claimants to show him the monuments (Tr. 180). His determination of the location of the Leroy No. 2 claim was made on the assumption that the workings represented the discovery point for the Leroy No. 1 and projecting the boundaries from that point using the discovery notices

17/ The location notice for the Leroy No. 1 claim states that the claim "extends 500 feet Northerly and 1000 feet Southerly from the discovery monument on which this notice is posted, along the course of said center line of said claim" (Exh. D at 1 (emphasis added)).

(Tr. 128). He found no workings on the Leroy No. 2 claim during a helicopter reconnaissance of that claim as it would be located, according to his projection (Tr. 131).

Having thus determined the location of the Leroy No. 2 claim, Zentner examined what he believed to be the southern end of this claim, finding neither workings nor visible veins (Tr. 125, 131). Zentner took no samples because he could find no quartz veins or any structure where he believed there might be significant mineralization (Tr. 132, 185). Zentner concluded that no discovery was present within the Leroy No. 2 claim because of the absence of vein systems within the claim and because the valuable vein which exists within the Leroy No. 1 claim and continues toward the Leroy No. 2 claim is faulted before it reaches that claim (Tr. 136, 178-79, 185-86).

Appellants, however, dispute the Government's placement of the Leroy No. 1 and No. 2 claims. Jeanne E. Trump testified regarding her understanding of the location of the discovery point within the Leroy No. 1 claim. Trump placed that point to the north of the point identified by the Government mineral examiner, i.e., between the existing adits and the millsite (Tr. 411, 417). However, Trump admitted limited familiarity with the claim (Tr. 410). More persuasive testimony was given by Phil Holdsworth. This testimony was summarized in Judge Clarke's decision at pages 20-21:

> Mr. Holdsworth testified that he visited the Leroy properties in 1954 in his duties as Commissioner of Mines for the Territory of Alaska and took samples from the claim. The results of assays of these samples and their origins appear on contestees' Exhibit G, a detailed map of the Leroy mine created in 1950 by the Territorial Department of Mines. This map has been incorporated into figure C-47 of government's Exhibit 14, a joint U.S.G.S. - U.S. Bureau of Mines Open-file Report 78-494, published in 1978.
>
> 82 IBLA 371

Mr. Holdsworth testified that the samples so taken [were] from the sill of the mine (Tr. 234). Assay results from Holdsworth's samples also appear in contestees' Exhibit H, an assay report performed in 1954 by the Territory of Alaska Department of Mines Assay Office.

The witness testified that on August 27, 1980, he returned to the Leroy properties to re-examine them (Tr. 239). Upon this re-examination, a large, angular rock with red paint on it was pointed out to him by the contestees as being the western boundary marker for the common endline between the Leroy No. 1 and Leroy No. 2 mines (Tr. 240). Mr. Holdsworth testified that, following the identification of the rock, he surveyed the endline by running a bearing at south 60 degrees east from the rock. This bearing was chosen as the proper direction of the boundary because it is 90 degrees from the established bearing of the centerline of the Leroy claim (Tr. 255). Holdsworth next stated that he drew a line with this bearing on Exhibit G for the contestees, which resulted in the boundary between the Leroy No. 1 and Leroy No. 2 occurring near the center of the adits existing on the Leroy mine. He then described which of the samples taken in 1954 and reported on Exhibit G fall on Leroy No. 2 based upon his placement of the boundary. These samples are labeled 54-33, 54-34, 54-35, 54-29, 54-28, 54-30, 54-31 and 54-32 and have corresponding values, in ounces of gold per ton, of 1.56, 0.42, 0.73, 2.63, 0.38, 0.25, 0.10, and 0.46, respectively (Tr. 243). [(Exh. H).]

Mr. Holdsworth then marked on Exhibit G the approximate location of the large boundary rock, and on government's Exhibit 6, the location of the Leroy claims using the rock as datum (Tr. 249).

The witness further testified that, in any event, a reading of all the location notices pertaining to the Leroy claims, leads to the conclusion that the true boundary location is very near that obtained using the rock as the initial reference point (Tr. 245).

* * * * * * *

Upon his cross-examination, Mr. Holdsworth stated that he did not observe, nor was he shown, the large rock during his visit to the claims in 1954 and that he never observed, nor was shown, the discovery point for either of the Leroy Claims (Tr. 252, 254). He did, however, observe a post during his 1954 visit which claimant Albert Parker told him was a boundary marker delineating the Leroy No. 1 from the Leroy No. 2. This post had been knocked out of place by an avalanche, and he helped Mr. Parker replace it. The post was placed on the eastern edge of the claim, 300 feet from its center. Although he did not observe the rock at this time, Mr. Holdsworth stated that the post was replaced in an area opposite the rock (Tr. 296).

In his September 1983 decision, Judge Clarke concluded that the Government mineral examiner properly determined the location of the Leroy No. 2 claim based on the description in the location notice for the Leroy No. 1 claim by reference to a discovery monument, which the examiner assumed was in the area of the existing adits. Judge Clarke held that the latter assumption was reasonable because the adits had "produced large amounts of valuable ore over a 40-year period" (Decision at 27). Judge Clarke stated that a Government mineral examiner is entitled to make a reasonable determination of the location of a discovery point in the absence of any identification by the claimant, citing United States v. Smith, supra, and United States v. Ubehebe Lead Mines Co., 49 IBLA 1 (1980). However, those cases relate to the risk which a claimant assumes, by failing to identify points of discovery, that a mineral examiner will be unable to verify a discovery, and do not relate to the location of discovery points for purposes of determining the situs of a claim.

Federal and state laws require that the boundaries of a lode claim be marked on the ground to show the extent of the appropriation and to give notice of the ground claimed. See 30 U.S.C. § 28 (1982); Alaska Stat. 27.10.030(2). Once a location is marked on the ground so that its boundaries may readily be traced, the claimant has complied with the law, and unless state law requires that he do so, he need not maintain or restore the monuments if they are removed or obliterated without his fault. See 1 American Law of Mining § 5.68 (1983), and cases cited.

Where the monuments are found on the ground, or their position or location can be determined with reasonable certainty, the monuments control over

the description in the location notice. Dye v. Duncan, Dieckman & Duncan Mining Co., 164 F. Supp. 747 (W.D. Ark. 1958); Book v. Justice Mining Co., 58 F. 106 (D. Nev. 1893); Grey v. Coykendall, 6 P.2d 442 (1931); Price v. McIntosh, 1 Alaska 286 (1901). If no monuments are present, their position can be established by testimony of a witness who saw them standing after being placed. Daggett v. Yreka Mining & Milling Co., 86 P. 968 (1906).

In the present case, we are partially persuaded by the fact that the Government's evidence rests solely on the assumption that the existing adits (commenced prior to the amendment of the location notices) constitute the discovery point described in the location notice for the amended Leroy No. 1 claim. It would thus appear that the existing adits which were collared prior to the amendment of the Leroy claim were at or near the discovery point for that claim. See Exh. I. When examining only the location notices, this monument would seem to be the same as that described in the amended Leroy No. 1 claim. See Exh. D at 1. However, the Government's placement of the Leroy No. 1 claim shifts that claim southerly of the original Leroy claim. In any case, the Government's case with respect to the location of the Leroy Nos. 1 and 2 claims is largely based on speculation. 18/ See Tr. 181-83, 197. Having failed to ask the claim owners to identify the claim corners on the ground, the mineral examiner ran the risk that the actual location of the claim was not as it had been projected.

18/ Judge Clarke stated that the Government's case is supported by the fact that the location notices for the Leroy and Leroy No. 1 claims indicate a one-half mile southern shift in the location of the Leroy No. 1 claim with respect to the location of the original Leroy claim. He concluded that the Government's placement of the Leroy No. 1 claim, unlike appellants', supports such a shift. However, the magnitude of the shift is about 500 feet. We conclude that the disparity between what the location notices appear to state and what the Government's case purports, reflects a gross calculation of distances which can equally support a 500-foot northern shift of the Leroy No. 1 claim.

In contrast, appellants offered testimony by Holdsworth regarding observations made by him in 1954 when he was an employee of the Territory of Alaska. Although the identification of the claim boundaries was not the purpose of the 1954 examination, during the course of the examination a post which had marked the easterly corner common to the two claims was found by Holdsworth and Albert Parker, the brother of the locator of the two claims and one of the operators of the property. This post had been displaced by a snowslide, an occurrence common to the area, and was then replaced by Parker in what Parker stated to be the proper location. Holdsworth further testified that he was shown what was represented to be the westerly common corner during a subsequent examination in 1980. Holdsworth then established the location of the two claims based on the physical location of these two corners and the bearing of the claim from the claim description which corresponded with the strike of the apex of the vein (Tr. 239, 295-96; Exh. G). We conclude that appellants' evidence regarding the location of the Leroy Nos. 1 and 2 claims is more persuasive. 19/

While it can be argued that the 1980 statement by the claimants that the rock was a boundary marker may have been made in contemplation of the mining claim contest, the statement is supported by the 1954 observations by Holdsworth and statement by Parker that the post was a corresponding boundary marker. Moreover, the location of the claims as described by appellants places the existing adits near the dividing line between the claims, rather

19/ In addition, while not persuasive standing alone, the description of the assessment work on the Leroy No. 2 claim in 1944 and 1945 describes mining as having been conducted on the Leroy No. 2 claim. This statement supports the location of the claims described by appellants, especially in light of the finding by the mineral examiner that there had been no evidence of any work on the Leroy No. 2 claim as placed by his projection.

than in the center of the Leroy No. 1 claim, as the Government's evidence indicates. See Exh. K (map of Leroy mine). 20/ It is likely that in 1944 the claimants located the two Leroy claims as described by appellants so as to take advantage of location of mineral in place in order to support both claims and claim as much of the strike of the vein as possible. It is equally likely that, when locating the two claims, the claimants, who appear to have been knowledgeable prospectors and miners, would have recognized the same change in rock type that was noticed by the mineral examiner. There was no evidence that the locators of the Leroy Nos. 1 and 2 claims attempted to blanket the area with mining claims. On the contrary, it appears that they made a careful attempt to locate the apex of the vein being mined. The location of the claims as described by appellants and their witnesses more closely encompasses the actual location of the apex than does the location as projected by the mineral examiner. Thus, we accept appellants' placement of the Leroy Nos. 1 and 2 claims.

In his September 1983 decision at page 27, Judge Clarke stated that if appellants' placement of the Leroy No. 2 claim is accepted, "sufficient evidence exists to show a valid discovery on the Leroy No. 2, and this contest must be dismissed." We conclude, after reviewing the evidence, that appellants' evidence is sufficient to overcome the Government's prima facie case which was based on the absence of mineralization within the Leroy No. 2 claim

20/ In his report of the reexamination of the Leroy mine and vicinity, dated Aug. 27, 1980 (Exh. K), Holdsworth states at page 2:

"The Leroy vein system has an average strike of N 30 degrees E - S 30 degrees W and dips steeply to the northwest. The Leroy No. 1 and No. 2 claims were staked along this strike with the outcrop of the Leroy vein as the centerline. It should be noted here that more than half of the ore mined in the past came from the Leroy No. 2 claim, and that the recorded ore reserves remaining below the lower tunnel level appear to be on the Leroy No. 2 claim."

as it was positioned on the ground by the mineral examiner. In particular, we rely on the assay results from sampling done in 1954 (Exh. H), which Holdsworth placed within the Leroy No. 2 claim (Tr. 243) and which he states have continuing applicability (Tr. 244).

Tunnel Site Nos. 1 through 4 Tunnel-Site Claims

[5] Tunnel-site claims constitute a means of exploration or discovery, and provide the owner with the right of possession of all veins or lodes within 3,000 feet from the face of the tunnel on the line thereof, not previously known to exist and discovered in such tunnel, the same as if discovered from the surface. 30 U.S.C. § 27 (1982); Creede and Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transportation Co., 196 U.S. 337 (1905); Enterprise Mining Co. v. Rico-Aspen Consolidated Mine Co., 167 U.S. 108 (1897).

The record indicates disagreement as to the location of the tunnel sites. See Exh. D at 12-17; Exh. E. Zentner, the Government mineral examiner, was only able to locate one tunnel, i.e., the west adit of the Leroy mine (Tr. 134, 201). However, the location notices for the tunnel sites indicate that the Tunnel Site Nos. 1 and 2 claims were supported by one tunnel and the Tunnel Site Nos. 3 and 4 claims were supported by another. See Exh. D at 14-17. The west adit which was driven in the Leroy lode mining claim in the 1930's and early 1940's appears to be the face of the former tunnel site. See 2 Tr. 9, 17. With respect to the latter tunnel site, appellants present evidence that the tunnel face is an adit known as the A. F. Parker prospect, located northwest of the west adit and was used to

support the location of the Tunnel Site Nos. 3 and 4 claims (Tr. 370-72, 413). See Exh. BBB. Jeanne Trump admitted that no work had been done on the A. F. Parker adit since about 1940 (Tr. 414). The lines of the tunnels were drawn on exhibit 6, a map of the Reid Inlet area, by Zentner (Tr. 93, 132-34).

In his September 1983 decision, Judge Clarke held that "declaration of nullity would be superfluous and there is no need for any further administrative remedy." The basis for this determination was the finding of this Board in United States v. Livingston Silver, Inc., 43 IBLA 84 (1979). In that case, which also involved a tunnel-site claim, the Board agreed with the Administrative Law Judge that:

> If no veins or lodes were discovered in the tunnel prior to the withdrawal or if a discovery was made, but the vein or lode was not appropriated by the location of a lode mining claim prior to the withdrawal, it would appear that the tunnel site location is now meaningless and of no effect. The withdrawal, and any conclusion that the tunnel site is no longer effective, would not, however, affect any rights the contestees might otherwise have to run the tunnel for the purpose of removing ore from patented or valid mining claims.

43 IBLA at 86.

In effect, we held that the tunnel-site claims remained outstanding as valid existing rights, but, as such, they were without effect as to the acquisition of undiscovered veins or lodes along the line of the tunnel for 3,000 feet from its face, except as encompassed in patented or valid unpatented mining claims which were in existence on the date of withdrawal.

In Enterprise Mining Co. v. Rico-Aspen Consolidated Mine Co., supra, the court concluded that a discovery of a vein or lode within a tunnel under a tunnel-site claim relates back to the date of location of that claim. Therefore, once a discovery is made, it would relate back in time to a date prior to the intervening withdrawal. See R. Gail Tibbetts, 43 IBLA 210, 86 I.D. 538 (1979) (doctrine of relation back). This conclusion merely accords with the statute which intended to give the tunnel-site claimant priority over subsequent surface locators of the discovered vein or lode. See Creede & Cripple Creek Mining & Milling Co., supra. Moreover, the "right of possession" accorded by the statute is defined as the "right to appropriate" 1,500 feet in length on the course of any discovered vein or lode on either side of the tunnel bore. 1 American Law of Mining § 5.38, at 798.1 (1983). This inchoate right vests upon the subsequent discovery of a vein or lode, and necessarily includes the right to then locate a lode mining claim with respect to the discovered vein or lode. See 1 American Law of Mining § 5.42, at 806 (1983). That lode claim would predate any intervening withdrawal because it would be based on a right of appropriation which related back to the date of location of the tunnel-site claim. Therefore, we conclude that the Board erred in Livingston Silver when adopting the conclusion by the Judge that an intervening withdrawal would foreclose whatever rights a tunnel-site claimant has to possess qualifying veins or lodes pursuant to a valid tunnel-site location unless the claimant has also either discovered a vein or lode or made a valid surface location of that lode prior to the withdrawal. To that extent, United States v. Livingston Silver, Inc., supra, is overruled.

In his decision Judge Clarke made the following determination:

> Accordingly, it is recognized that although the contestees have lost their right to possession of undiscovered veins within 3,000 feet of the face of each tunnel site, the government's complaint alleging that tunnel sites No. 1 through No. 4 do not comply with applicable law, 30 U.S.C. § 27, [is] hereby dismissed.

(Decision at 30). This determination was based on the following finding:

> While the body of law on tunnel sites is not extensive, the language quoted at the outset of this discussion which states simply that a tunnel site is not a mining claim is plain and persuasive. When a tunnel site is not properly located, the potential locator has lost only a secured means of exploration, not a mining claim. Because no veins or lodes were discovered in the tunnel prior to the withdrawal of the lands from mineral entry, it would appear that the tunnel site location is now meaningless and of no effect. Hence, in the words of the Board in United States v. Livingston Silver, Inc., supra, a declaration of nullity would be without substance and there is no need for any further administrative remedy.

(Decision at 29).

[6] We conclude that it was improper for Judge Clarke to dismiss the complaint in this case on the basis that a declaration of nullity would be without substance and there is no need for any further administrative remedy. To the extent that United States v. Livingston Silver, Inc., supra, can be relied upon to support a dismissal of a complaint charging that a tunnel-site claimant has failed to locate the claim in compliance with 30 U.S.C. § 27 (1982), that case is overruled. The statute impliedly gives the owner of the tunnel site an inchoate right in any "blind" veins or lodes which may

be found in the course of driving the tunnel. 21/ As noted previously, the claimant would have the right to locate a lode mining claim based on this discovery.

The Department, which is entrusted with the administration of the public land, is authorized to determine the validity of claims which encumber that land. Thus, it is entitled to determine, for its own purposes, the validity of tunnel-site claims with respect to undiscovered veins in the same way it determines the validity of lode and placer claims. See Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 450 (1920). It is, therefore, appropriate for the Department to make a finding concerning whether a tunnel-site claim has or has not been properly located, especially in those cases where the land has subsequently been withdrawn from mineral entry.

[7] The key fact in the determination of validity of appellants' tunnel-site claims is appellants' reliance on preexisting adits and related failure to actually commence a tunnel upon a location of each of their tunnel-site claims. The commencement of a tunnel is a prerequisite to the location of a tunnel-site claim. 1 American Law of Mining § 5.38, at 800 (1983). In Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 182 U.S. 499, 508 (1901), the Court stated that the statute did not intend that surface locations of any discovered veins or lodes would be displaced "before the commencement of the tunnel." The importance of commencing the tunnel, evident from 30 U.S.C.

21/ The Federal tunnel site law is unclear as to whether the tunnel locator is entitled only to blind veins cut by the tunnel, i.e., those which do not outcrop on the surface, or to both blind veins and previously unknown outcropping veins. See 1 American Law of Mining § 5.38 (1983).

§ 27 (1982), is that it serves to define the starting point of the line of the tunnel, and, thus, any possible veins or lodes, intersecting that line, which the tunnel-site claimant would in the future have a right to appropriate. See 43 CFR 3843.2. In effect, it places surface locators on notice of these facts. Until the tunnel is begun, the claimant has not established conclusively the direction in which the tunnel is to be run. Existing adits simply do not serve that purpose because a claimant can then continue in any of several directions. The record clearly discloses that the purpose of a tunnel site (exposure of previously unknown veins) is not at all consistent with the original intention of the operators when the initial adits were driven in the late 1930's or early 1940's. In the present case, the record indicates that appellants did not commence a tunnel on any of their tunnel-site claims at or near the time they located the tunnel-site claims. For this reason, the claims must be considered void. They were not properly located in accordance with 30 U.S.C. § 27 (1982).

It is also evident that appellants have attempted to locate four tunnel-site claims based upon the openings at two preexisting adits. These preexisting adits commence in the Tunnel Site Nos. 1 and 4 claims (Exh. 6; Tr. 413). Thus, the Tunnel Site Nos. 2 and 3 claims are not supported by any underground openings, regardless of when the underground openings were driven.

Access to Claims After Withdrawal

On appeal, appellants generally contend that they were denied access to their claims after September 28, 1976, by NPS and thus, did not have an opportunity to fully develop their case that each of the mining claims is

supported by the discovery of a valuable mineral deposit which predates closure of the land to mineral entry. We have held that mining claims are not properly declared null and void for lack of discovery where the mineral claimants are effectively foreclosed from proving that a discovery exists. United States v. Foresyth, 15 IBLA 43 (1974). We have further recognized that while, in cases of withdrawal of the land, such withdrawal entitles the Government to restrict the development of a claim, restrictions must be reasonable "in order to permit a claimant a fair opportunity to make [its] case." United States v. Niece, 77 IBLA 205, 207-08 n.3 (1983).

In the present case, we conclude that appellants were not precluded from gathering evidence to support their case. Appellants refer first to a letter (Exh. CC) to the Superintendent, Glacier Bay National Monument, NPS, dated May 31, 1977, submitting a proposed exploration plan involving an underground drilling program for the Leroy mine, situated in the Leroy No. 1 claim. See Exh. G. By letter dated August 8, 1977 (Exh. CC), the Superintendent, NPS, notified appellants that: "Public Law 94-429 and related regulations require completion of a validity determination and approval of a plan of operation before any mineral exploration or mining activity can be conducted." See also Tr. 351, 378. Appellants next refer to a letter (Exh. EE), from the Superintendent, NPS, dated July 8, 1977, informing them that annual assessment work was no longer required. Appellants next refer to a letter (Exh. SS) to the Superintendent, NPS, dated July 17, 1980, requesting permission to do assessment work on the Leroy Nos. 1 and 2 claims. That request was denied by letter dated August 1, 1980 (Exh. TT). Finally, appellants refer to various statements in the transcript which they claim support their contention. For instance, Fred Spicker stated that the claimants had been

refused permission to do additional exploration or development work (Tr. 74). It is evident that appellants interpreted these denials of permission to do additional work on the Leroy Nos. 1 and 2 claims as denying them any access to any of the claims. See Tr. 324; 2 Tr. 226. We conclude, however, that there is no evidence that appellants were denied access to the claims after September 28, 1976, in order to collect evidence of a preexisting discovery; rather, appellants were denied permission to do additional discovery or development work. A discovery must be judged by what has been exposed on a mining claim at the time of a withdrawal, and a claimant is not entitled to go onto a claim thereafter for the purpose of exposing new veins or lodes. See United States v. Chappell, 72 IBLA 88 (1983); United States v. Montapert, 63 IBLA 35 (1982). We note that, in contrast to appellants' contention, they were granted permission by NPS to open portal No. 1 within the Leroy No. 1 claim, which was blocked by debris, in order to permit examination of workings developed prior to withdrawal. See Exhs. GG and II. That permission was consistent with the duty of NPS to permit access to a claim in order to verify a preexisting discovery. Moreover, the record indicates that appellants were aware at the time of the first set of hearing dates in October 1980 that they could gain access to the mining claims for purposes of proving a discovery, and that they had until September 1982 to gather that evidence (2 Tr. 27-28).

Appellants also assert that they were denied a continuance in order to present testimony by Dale Henkins, whose testimony regarding the Challenger claims took up much of the lost portion of the transcript, and John Graham, whose purported testimony would also concern the Challenger claims. See 2 Tr. 51. Neither Henkins nor Graham was available on the September 15, 1982,

hearing date. An Administrative Law Judge may properly grant a reasonable continuance in a hearing or, alternatively leave the record open in order to permit the introduction of additional testimony. Judge Clarke chose the second course of action. See 2 Tr. 51. In addition, Judge Clarke offered the alternative of submitting an affidavit. See 2 Tr. 92. Accordingly, we conclude that appellants have not been prejudiced by the manner in which Judge Clarke conducted the hearing. Indeed, at any time between the closing of the hearing and the time the record was closed on October 25, 1982, appellants could have submitted additional evidence, including affidavits. Appellants request a rehearing, but have presented no evidence to justify granting such a request. See United States v. Edeline, 24 IBLA 34 (1976). In particular, appellants have made no proffer of proof indicating that a rehearing might be productive of a different result. The request is denied. 22/

Accordingly, we hereby affirm Judge Clarke's September 1983 decision to the extent that it declares the Joe's Dream Nos. 1 through 6 lode mining claims, the Mt. Parker Mining Nos. 1 through 5 placer mining claims, and the Challenger Nos. 1 and 2 lode mining claims null and void for lack of a discovery. In addition, we reverse Judge Clarke's decision to the extent it dismisses the contest against the Tunnel Site Nos. 1 through 4 claims and find those claims to be null and void ab initio. We reverse Judge Clarke's decision declaring the Leroy No. 2 lode mining claim null and void, and dismiss the contest against the Leroy No. 2 claim.

22/ Appellants also contend that the transcript, which contains numerous unintelligible portions, should not form the basis for an adverse decision. Having carefully read the transcript and changes thereto submitted by appellants, we can discern no unintelligible portions which, in context, appear significant to the resolution of this case. These deficiencies, while regrettable, do not entitle appellants to a dismissal.

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and reversed in part.

R. W. Mullen
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge